THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

AT THE December Stated Meeting, the report of the Special Committee on the Proposed Zoning Law, Phillip W. Haberman, Jr., Chairman, was debated before a large audience. The decision of the meeting was to postpone final action on the report to the January Stated Meeting. At that meeting ample time will be afforded for full debate on the report.

An experiment was tried at the December meeting. The meeting was called to order at 5.30 o'clock. Following routine business, the report on zoning was presented. The meeting then recessed at 6.45 for cocktails and a buffet supper. The meeting resumed at 8 o'clock to hear a discussion by Representative Jacob K. Javits of his bill to establish standards for the conduct of Congressional investigations. The bill reflects the recommendations on the Association's Committee on the Bill of Rights. Whitney North Seymour and Allen T. Klots participated in the discussion.

THE COMMITTEE on Municipal Affairs, W. Mason Smith, Jr., Chairman, has conveyed to Mayor Robert J. Wagner, Jr., its approval of the proposed modifications in the city government to provide for a City Administrator responsible for supervision of the City's administrative agencies, for a Deputy Mayor to assist

the Mayor in his legislative and ceremonial functions but whose duties shall not overlap those of the City Administrator, for the adoption of a performance budget in lieu of the outmoded line budget, and for a new system of personnel administration under a Personnel Director responsible to the Mayor. The functions and powers of the City Administrator, Deputy Mayor and Personnel Director should, the Committee believes, be substantially as outlined in the reports of the Mayor's Committee on Management Survey and the Temporary State Commission to Study the Organizational Structure of the Government of the City of New York. The Committee urged the Mayor-elect upon assuming office, to take prompt action to put all four changes into effect.

The Committee strongly endorsed the First Report of the Temporary State Commission of which Devereux C. Josephs is Chairman. In commenting on the draft legislation included in that report, however, the Committee advised against transferring the function of preparation of the Capital Budget from the City Planning Commission to the City Administrator.

THE MOOT court team from the University of Nebraska Law College won the championship of the fourth annual National Moot Court Competition. Nebraska defeated the team from Georgetown University Law Department in the final argument. The court for the final argument consisted of The Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States; The Honorable Carroll C. Hincks, Judge of the United States Court of Appeals for the Second Circuit; The Honorable Charles E. Wyzanski, Jr., Judge of the United States District Court, District of Massachusetts; The Honorable David W. Peck, Presiding Justice of the Appellate Division, First Department; The Honorable John W. Davis; The Honorable Arthur H. Dean, Special Envoy to Korea; and the President of the Association.

The fictitious case which was argued involved the contractual rights of a professor of political science who claimed his constitu-

tional privilege to refuse to answer certain questions put to him by a congressional committee investigating Communist infiltration into education. The decision, of course, was not on the merits of the case but on the forensic abilities of the students. On the winning Nebraska team were William H. Grant, Ronald W. Hunter, and Eleanor L. Knoll. The team won for its school possession of a silver cup named in honor of Judge John C. Knox and The William J. Donovan Prize of $500. The University of Chicago Law School team was judged to have submitted the best brief, and was awarded possession of the Harrison Tweed Bowl. On the Chicago team were Marvin E. Stender, Harold A. Ward, III, and Paul N. Wenger, Jr. Miss Eleanor L. Knoll of the Nebraska team was awarded the prize for the best individual argument before the court.

At its meeting on December 3, the Board of Estimate adopted the 1954 Capital Budget which included funds for the new City and Municipal Court building. On the same date the Board approved the award of a contract to an architect for the preparation of plans for the new courthouse. Completion of the new courthouse is scheduled for 1958. This action by the Board marks the successful culmination of the work of the Association's Special Committee on a New Courthouse for the City and Municipal Courts, of which Francis H. Horan is Chairman.

At its December meeting, the Committee on Legal Aid, David R. Blossom, Chairman, had as its guest Benjamin Schmier, Attorney, Criminal Courts Branch, The Legal Aid Society. Mr. Schmier spoke of the work of the Criminal Courts Branch in which he has served for nine years and during which time has handled something like 25,000 defendants. The Committee also heard a report by the Chairman of its Subcommittee on Investigation, Leonard T. Scully. Mr. Scully had conferred with the Commissioner of Mental Hygiene with regard to methods of

handling future applications for advice and assistance received by the Association from inmates of various state mental institutions. The Committee also received a report from James J. Ward, Jr., Fellow of the Association, with respect to the Committee's proposal that printed notices be handed to accused persons advising them of their constitutional right to counsel. Such notices are now in use.

THE CHAIRMAN of the Committee on Art, John W. Thompson, has announced that the Annual Photographic Show will open on March 11, and that the Art Show will open on May 4. Robert L. Golby is Chairman of the subcommittee in charge of the Photographic Show and Harold J. Bailey Chairman of the subcommittee in charge of the Art Show.

A LARGE audience enjoyed this year's Annual Twelfth Night Party which was held in honor of The Honorable Augustus N. Hand. The Committee on Entertainment, Boris Kostelanetz, Chairman, arranged a varied program, and the guest of honor made a substantial contribution by singing the American folk songs for which he is so justly famous. Assisting performers included J. Edward Lumbard, Jr., and Leonard P. Moore, U.S. Attorneys for the Southern and Eastern Districts. Judge James Garrett Wallace returned in the dual role of composer and performer. Harris Steinberg presented a stimulating illustrated lecture and Judge Arthur K. Markewich acted as Master of Ceremonies.

AT ITS November meeting, the Committee on the Round Table Conference, Howard Hilton Spellman, Chairman, had as its guest William Wolfman, Chief Counsel of the Title Guarantee and Trust Company. Mr. Wolfman spoke before a large audience on recent developments in real estate law. The guest at the January meeting of the Committee will be The Honorable Abraham N. Geller, Judge of the Court of General Sessions.

The Calendar of the Association for January and February

(As of December 31, 1953)

January	4	Dinner Meeting of Special Committee for Defense of the Constitution
		Meeting of Committee on the Domestic Relations Court
		Dinner Meeting of Committee on Professional Ethics
		Meeting of Subcommittee of Committee on Public and Bar Relations
January	5	Dinner Meeting of Committee on International Law
		Dinner Meeting of Committee on Labor and Social Security Legislation
		Dinner Meeting of Committee on Legal Aid at Harvard Club
		Dinner Meeting of Committee on Municipal Court
		Dinner Meeting of Committee on Taxation
January	6	*Twelfth Night Festival.* Sponsorship Committee on Entertainment
January	7	Dinner Meeting of Executive Committee
		Meeting of Section on Wills, Trusts and Estates
		Meeting of Subcommittee on State Legislation of Municipal Court Committee
		Meeting of Subcommittee on Amendments to Section 90 of Judiciary Law of Law Reform Committee
January	11	Meeting of Committee on the City Court of the City of New York
		Dinner Meeting of Special Committee on Defense of the Constitution
		Dinner Meeting of Committee on Federal Legislation
January	12	Lecture by Hon. Francis Bergan, Associate Justice, Appellate Division, Supreme Court, State of New York, Third Department. 8:00 P.M. *Buffet Supper, 6:15 P.M.*
		Meeting of Auxiliary Members of Municipal Court Committee
January	13	Dinner Meeting of Committee on the Study of Administration of Laws Relating to the Family

Dinner Meeting of Committee on Insurance Law
Meeting of Section on Labor Law

January 14 Dinner Meeting of Committee on Domestic Relations Court
Meeting of Subcommittee of Foreign Law Committee
Meeting of Section on Jurisprudence and Comparative Law

January 15 Columbia University Bicentennial Conference for Lawyers and Judges

January 16 Columbia University Bicentennial Conference for Lawyers and Judges

January 18 Meeting of the Art Committee
Dinner Meeting of Committee on Atomic Energy
Dinner Meeting of Committee on Bill of Rights
Meeting of Library Committee
Dinner Meeting of Committee on Municipal Affairs

January 19 *Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
Meeting of Committee on State Legislation

January 20 Meeting of Committee on Admissions
Meeting of Committee on Arbitration
Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Dinner Meeting of Committee on Foreign Law
Dinner Meeting of Committee on Courts of Superior Jurisdiction

January 21 Meeting of Committee on Arbitration

January 22 Meeting of Section on Taxation

January 25 Lecture by the Hon. Ewen E. S. Montague, C.B.E., Q.C., Judge Advocate General of the British Navy, 8 P.M., *Buffet Supper, 6:15 P.M.*
Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on Military Justice

January 26 *Round Table Conference, 8:15 P.M.* Guest — Hon. Abraham N. Geller, Judge of the Court of General Sessions of the County of New York
Meeting of Committee on State Legislation

January 27 Meeting of New York State Bar Association Section on Food, Drug and Cosmetic Law

January 28 Meeting of New York State Bar Association Section on Antitrust Law

January 29 Annual Meeting of New York State Bar Association

January 30 Annual Meeting of New York State Bar Association

February 1 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Municipal Court
Dinner Meeting of Committee on Professional Ethics

February 2 Dinner Meeting of Committee on Legal Aid at Harvard Club
Meeting of Section on Litigation
Meeting of Committee on State Legislation

February 3 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

February 4 Dinner Meeting of Committee on Admiralty
Dinner Meeting of Committee on Domestic Relations Court

February 8 Dinner Meeting of Committee on Municipal Affairs

February 9 Lecture by Dag. Hammarskjold, Secretary-General of the United Nations, 8 P.M., *Buffet Supper, 6:15 P.M.*
Meeting of Committee on State Legislation

February 10 Meeting of Section on Labor Law

February 15 Dinner Meeting of Committee on Bill of Rights
Meeting of Library Committee

February 16 Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Meeting of Committee on State Legislation

February 17 Meeting of Committee on Admissions
Meeting of Committee on Foreign Law
Dinner Meeting of Committee on Insurance Law
Dinner Meeting of Committee on Courts of Superior Jurisdiction
Meeting of Section on Taxation

February 18 Meeting of Section on Jurisprudence and Comparative Law

February 23 Dinner Meeting of Committee on International Law
Meeting of Committee on State Legislation

February 24 *Round Table Conference, 8:15 P.M.* Guest to be announced later.

February 25 Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade Marks

Judges for Children

By Mrs. Eleanor Roosevelt, The Honorable John Warren Hill, Professor Walter Gellhorn, and Dr. Alfred J. Kahn

On April 29, 1953 the Committee on the Domestic Relations Court of the Association sponsored a symposium on "Judges for Children". Mrs. Sylvia Jaffin Singer, the Chairman of the Committee presided and in the course of her opening remarks said: "Each year for the past three years we have offered a symposium the purpose of which has been to bring to the Bar and to the public a closer understanding of the problems of a court with which we are vitally concerned. This year we celebrate the twentieth anniversary of the Domestic Relations Court as it is now constituted. It came into being on April 26, 1933.

"This court deeply affects the lives and destinies of thousands of children and their families each year. The press is never there and the public is never there. Occasionally counsel is there. Members of the Bar, such as the members of my committee and the auxiliary members who have been visiting the court, are there occasionally. Now and then you pick up a newspaper and somewhere on the back page you read: 'The Mayor has appointed Mr. X to be a judge of the Court of Domestic Relations.' What is it that Mr. X is expected to do? What are his powers? We want to help you to ask and answer such questions as: What kind of person should he be? How is he selected? How can we get the most qualified people for this very important court? To the end that informed public opinion may bring about the best possible court for children, we offer this symposium."

THE HONORABLE JOHN WARREN HILL

Presiding Justice, Domestic Relations Court

We in the Court of Domestic Relations are deeply gratified by the interest of this committee, and of The Association of the Bar of the City of New York

in arousing interest in the matter of selecting as Judges for the important work of this court the finest and best qualified lawyers available.

We have today in this court as high an average of devoted judges as can be found in any court. And let it be remembered that any criticism ever made of our court or of our judges cannot stand up if made on a comparative basis, but can be sustained only if based on the fact that the work of our court calls for specialization and that here and there we may not have a specialist.

The Domestic Relations Court of New York City, and the same can be said of any Children's Court, is without doubt the most important court in the community. To these courts are brought children who are torn and twisted emotionally and adults whose marriages are headed for the rocks. In these courts society is always the plaintiff and the stake is the souls of unfortunate human beings whose happiness or misery affect the welfare of that community.

It is unfortunate that a court must play the role of a physician in situations of this kind. This feeling is so accepted today that whenever possible wrongful trends are now corrected on a voluntary basis, with the court remaining or stepping out of the picture. However, there are many cases where the patient refuses to accept treatment on a voluntary basis and the authority of the court is needed to spoon out the prescription. Under our constitutional, American way of life, society and government may not interfere in your life unless it be according to law. This principle is almost a passion with us and should remain so. But the law does provide that courts may interfere with the personal habits of parents when those habits affect the welfare of their children. And the law goes further in regulating the life and habits of a child than it does those of an adult. So, these courts do interfere with the lives of many of their clients, changing ways and patterns of living.

The idea of the court is to treat and rehabilitate. To this end these courts invoke treatment, practices and facilities, which are improving from day to day, such as: helpful intake policies, clinical services which afford diagnostic and also treatment facilities, trained probation officers to make social investigations and to give constructive guidance and leadership for those who can remain in the community, and also foster care in controlled environments with character building programs for those delinquent children who must be removed from destructive environments.

Now, what about the judge of this court? What kind of a man should he be? His is a tremendous responsibility, greater than that of the judge of any other civil court where the battle is for dollars and cents, certainly greater than that of any adult criminal court where the word "punishment" is still occasionally heard and where the chances of rehabilitating the offender are not as good as in the case of the youngster. The duty of a Children's Court judge is two-fold. First, to see if there is a legal basis for society to interfere in the situation, and secondly, to weigh all the scientific and social evidence that has a bearing on the child's needs, yes, and on the community's needs, pour in the required therapy, mix thoroughly, adding a modicum of good common sense, flavoring liberally with understanding and sympathy, and see that it is meted out regularly and as required in proper dosage.

How do you get a man capable and willing to do this? What are the qualifications for such a task?

The Domestic Relations Court Act of the City of New York, under which our court functions, makes an effort to define "qualifications required" in a person for his appointment as a Justice of this court. First, according to our law he must have been "admitted to practice as an attorney and counsellor-at-law of the Supreme Court of the State of New York at least five years prior to the date of such appointment." Well and good. A trained legal mind is required for this work. The Constitution safeguards the liberty and rights of a child as it does the adult. And there are numberless cases each day in which legal questions call for decision by such a mind.

But our statute recognizes that a judge of this court must have something besides a trained, legal mind. It goes on to say: "In making such appointments, the Mayor shall select persons who because of their character, personality, tact, patience and common sense, are especially qualified for the court's work." Undoubtedly, what our statute intends to say here is that the appointee must have an especial sensitiveness to the needs of the clients of the court from a social standpoint, and an understanding of that for which our statute provides: a socialized justice. Socialized justice is that which gives as well as takes.

The appointment of a judge to this particular court calls for the highest degree of selectivity. As seen, our statute does attempt to define the qualities required for the judges engaged in this work. I know of no other statute which attempts to do this for any court. But about all that the statute actually accomplishes from the standpoint of a taxpayer's suit for removal is to require five years experience at the Bar. You can't litigate the other requirements. Who can say that the man appointed does not have character, personality, tact, patience and common sense so as to be especially qualified for this work? Society is bound to rely solely on the honesty and good faith of the appointing authority to find men actually possessed of these additional qualifications. I suppose the language employed in the statute covers everything about as well as we could hope except that I should like to see the adjective "unusual" used to qualify each of these requirements, particularly when it comes to character, patience and common sense. Even with the addition of this adjective, the good faith of the appointing authority would have to be relied on.

I do not believe that too much experience in this field is particularly necessary provided other qualities are present, and provided there is an unusual degree of common sense so that the new judge is willing to listen to the testimony of experts as to the needs of the child in the particular situation. I have seen misdirected sentimentality in a newly appointed judge militate against the real interest of the child even though expert advice on hand warned the judge against the disposition which he made. Where he is possessed of common sense in large amount, the judge will know it is wise to rely on expert experience and opinion.

Patience and understanding are important qualifications in dealing with children and with adults. I talk about the quality of patience that does not

regard the clock but which permits clients and parties to have a reasonable amount of time in which to unload their particular burden or grievance on the court. In a court where the calendars are as long as ours, it requires unusual character, sometimes, to be patient in this way. I should like to see the words "mentally alert" included in this list of special qualifications. A slow judge can turn a long calendar into a "death march" for court personnel and for clients.

I do not believe that the appointing authority should confine himself to the required qualifications as specified in our statute. He should read the entire statute, catch its spirit and find authorization in pertinent parts thereof to the end that he finds in his appointee a man or woman of religious convictions, one who has faith in the therapy of religious guidance when properly applied.

And too, if it would really be used as a guide by the appointing authority, I should like to see our statute provide that the appointing authority exercise great care that the appointee be free of any personal prejudice and bias so as to be able to hear, approach and solve the problems of individuals without becoming emotionally involved himself.

Were I the appointing power I should look for a man possessed to an unusual degree of the qualities specified by statute for a judge of our court, together with the other attributes I have just mentioned. In addition, for our court, I would look for a man therapeutically minded, one able to experience and understand the suffering and anguish of those before him, a man possessed of a passion for healing.

WALTER GELLHORN, ESQ.*

Professor of Law, Columbia Law School

I can subscribe wholeheartedly to everything Judge Hill has said about the ideal individual whom an appointing authority ought to seek. I hope such an ideal individual exists in at least one instance. If there be eighteen in the city, so much the better. I think that the appointing authority will have a hard time finding them.

I think that it is customary in matters of this sort, in a discussion of this type, to tend to be sympathetic with the children who come before the judges in the Children's Court. My brief observation of that court leads me to sympathize with the judges. It seems to me that the task and the responsibility that they bear have dimensions that can not be equaled by any other court. As Judge Hill has said, the judges in this court really sit alone. All of us who are lawyers realize that the judges in most trial courts, even though they may sit as individuals, do not sit alone because so much of their work is

* In 1952, the Association established the Special Committee on the Study of the Administration of Laws Relating to the Family. A grant by Laurance S. Rockefeller enabled a comprehensive study to be made of the family court structure and of the work of welfare agencies in this area. Professor Gellhorn directed this study for the Special Committee.

subject to the consideration of the other judges. There is a professional interplay of minds, really a pooling of talents, if you will, for the resolution of the problems that the judges have. Certainly that is not true in this court.

In the first place, most of the people in this court are so poor that even if there were anything to appeal from, there would be very few appeals. Secondly, the sort of matters considered by the judges do not involve questions on which it is feasible to appeal. They involve, for the most part, the exercise of the discretion of one judge, which gives very little room for the exercise of the judgments of other judges.

Physically, the judges sit alone. There is no bench of judges. The individual judge sits to consider each case and he disposes of it as he goes. There is not, in short, the opportunity for him to amalgamate his insight. Each individual has to bring the insights that are necessary for the disposition of the cases.

I am sure that admonitions to the appointing authority about the sort of individuals that ought to be named are desirable, and I share in them. But it seems to me there are very few practitioners in the city whom I know, no matter how experienced they may be, who have the special experience and the talents that are called into play constantly in this court.

Once he is on the bench, the judge has to become aware of his own deficiencies, if he has any. I think it is typically the case that when we have to be aware of our own deficiencies, we tend not to be terribly aware. Perhaps in self-defense we tend to be a little bit scornful of what it is that we do not know. I think this is a trait which is not foreign to some of those who sit in the Children's Court and judge, at least as far as I can tell from what I concede to be a very brief and superficial observation.

I don't mean to focus at all on any individual members of the court, but I know in conversations with judges, some have said to me that they never had a moment's doubt about any of the cases they have decided over a period of years. This, I may say, is a freedom from doubt which is not widely shared. I would think that those judges were not being subjected to sufficient self-criticism, let alone outside enlightenment. I recall at least one of the members of the court who has such a distrust, misunderstanding and lack of awareness of the lessons that the psychiatrist has to teach the bench that, typically, he won't even read the psychiatrist's report. I say this not to suggest that there is anything intellectually or morally wrong with him, but I say there is a blind spot in his thinking, and that there is nothing to compel him to fill up that gap.

My suggestion is a very modest one, and I suppose it is one that comes naturally to the lips of one who is committed to the educational process. It seems to me that, in addition to whatever concern we may have about the appointment of judges in the first instance, the appointees, as well as the public, ought to be aware of the fact that a sort of post-graduate work is necessary for a person to commence work on that bench.

I know that the suggestion that a grown person go to school is offensive to everybody, because it perhaps has been the chief ambition of everybody to get out of school and I am in sympathy with that feeling. But it seems to me that

while experience as a legislator or experience as a practitioner in the civil courts or criminal courts or the experience in growing up or helping one's own family to grow up constitutes a fund of knowledge upon which a judge may draw, there are all sorts of problems which require more than this general knowledge. It seems to me that we ought to be patient with an appointee to this bench and we ought to recognize, as I think many of the appointees must themselves recognize, that they would be more competent if they did have a period of orientation before they got into the grueling grind.

The calendars Judge Hill talks about are very long. No one knows how long they are going to get, but one is really chained to that job. One can't take time off for a little seminar here or there that he thinks would be useful as he goes along.

It seems to me that a period of orientation reading, an exposure to difficult points that we, as lawyers who may be appointed to the court, have not been compelled to be exposed to before, a chance to observe the sort of places to which children will be sent in accordance with the court's judgments, the chance to confer on the highest professional plane with all the agencies of a public and voluntary type that are concerned with the functioning of the court, would really give the judge a chance to grasp the implications of the judgeship, which, I am bound to say, are now being missed.

Let us hope for the best sort of selection and then give the judge a breathing spell, after he has been selected, to get the benefits of social work. Let him find out what the psychiatrist can do and what the probation worker can do and then have him start sitting, instead of picking up the job as he goes along, for better or for worse.

MRS. ELEANOR ROOSEVELT

I think I am probably the least qualified person to be of any value on this panel, because I really have no experience that would lead me to any knowledge of what are the qualifications that a judge should have, but all of us, I think, are deeply concerned today about the rise in juvenile delinquency and, of course, we know that no group is more intimately connected with this problem than are the Children's Courts and the judges, not only in the Children's Courts, but in the Domestic Relations Courts.

I think everyone who has visited places where we have small children who are juvenile delinquents will agree with me that you cannot blame those children for what they are. You have to realize that they are the product of maladjustments in our society which are brought about by poor family environment and poor community environment. So I think perhaps one of the things that we look for in the choice of judges—particularly for this Court—are people who do know the conditions in the society in which these children have to grow up, because anyone not intimately acquainted with what produced these children could never be of any help in changing their future.

Now, the people who deal with this problem, of course, are always the judges. There are other people who help them, but ultimately what is done is

the judge's responsibility. I have always felt that if a child's first contact with the law could be with a very wise judge, we might hope to save many of our children and see them grow up to be good citizens. But it has to be a very wise judge, one who can understand people, who can understand their families, and who has the patience to understand a child. It is very difficult to have that patience, because a child can conceal, very often better than a grown person. It takes a great deal of patience and depth of understanding to bring out the real reasons that have made the child do the things that he has done. And so I think that the qualities that were mentioned in the statute are very important qualities, but above all I think judges should be people who care about their fellow human beings and who have the qualities of mind and heart that will lead them to deal wisely and justly and tenderly with those who come before them.

Now, I think all of us know that in the choice of judges a certain amount of politics must enter, but I think it should be the least possible consideration. The main consideration should always be that you get a judge with these qualities. You may have to decide that he must be a Democrat or a Republican, but he should not be chosen simply because he is one or the other. That should, perhaps, be included, but it should be because he or she has the other qualities that the final decision is made. I think that is one of the things that those of us who have been more or less connected with politics have, perhaps, before us very often, and I can remember hearing someone say once on my side of the political fence "All right, I am perfectly willing to have a Democrat, but he has to be the best possible Democrat and just as good as the best Republican that is named." And I think we should have it the other way around. Getting the kind of people that will deal well with this subject is very important because it means the future of the citizens of the country.

I sometimes think, since we spoke of that little school of Wiltwyck, how very easily some of those children can be guided in one direction or another. I remember, in fact, the director pointing to a little boy and saying, "He will either be the best painter in the world or he will be the worst gangster we ever had." So you really have to have a great deal of insight, I think, to be a great judge in this court.

If we have the type of judge that I have been trying to visualize, then I think we may hope to save future citizens and bring to the rest of us a better realization of what we should do to improve conditions in our society. It seems to me that the judge not only has the responsibility of dealing with the questions that come before him in the court but he or she has the added responsibility of telling the rest of us who have something to do with the choice of public servants what are the conditions which bring about these situations in the domestic life and in the conditions of the child today in our society. Unless we become aware of why these children are in Court, even having an alert-minded judge is not going to be enough. He must try to alert the people of the community so that they will bring the power they have under our government to help in a situation which is vastly important to the future of our country.

DR. ALFRED J. KAHN*

Associate Professor of Social Work
New York School of Social Work, Columbia University

One does not have to spend much time in Children's Court to discover that there are many different ideas of what a good judge is like. Moreover, the court operates under a statute and plan of administration which give the individual judge considerable leeway in defining his role. In fact, most of us here tonight would agree that in the interests of flexibility, experiment and democratic practice, one would not wish to have eighteen judges exactly alike.

Nonetheless, it is relevant to ask what we expect of Children's Court, for the court's basic philosophy has implications and consequences for the bench. We must at no point forget that:

1. This court is meant to help children, not to punish them.

2. The court's expressed philosophy is to see each child as an individual, with a unique history, particular problems and identifiable needs. It acts in the conviction that a disposition related to the offense alone cannot be sound. Behind this is the realization that the self-same anti-social acts of children or negligent conduct of parents may derive from different sources. Truancy, vandalism, specific "conduct disorders" or "neurotic traits" are symptoms which characterize a wide range of children, all of whom have different needs. Stealing, for example, may be the act of an economically deprived member of a gang of boys behaving in terms of their community's code, or of a kleptomaniac expressing his particular emotional disturbance.

3. This court intends to use all the resources which contribute to understanding a child and lead to the best disposition possible; the momentary courtroom impression cannot possibly provide sound basis for long-range plans.

4. The statute makes it perfectly clear that this court does not have a mandate to intervene in peoples' lives except under clearly defined conditions and in accord with certain specific procedures. If these conditions are not established and these procedures not followed, the court has no right to inaugurate dispositions which in its eyes would be helpful.

In sum, this court is charged with protecting the child within his family. Only when that is not possible may the court substitute for or supplement the family by the services of agencies, institutions or probation personnel—but, and this is important, only if objective findings warrant it and the best available knowledge establishes that intervention will contribute to socially desirable results.

If there is agreement with these premises, it becomes somewhat easier to find one's way through the diversity of approaches and to sift sound from

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* Dr. Kahn is the author of two important studies, one on the Juvenile Aid Bureau and another on truancy. He is also the author of "A Court for Children," recently published by the Columbia University Press.

unsound practice. Criteria then become available for "judging a judge" – because then it is possible to determine which practices are in harmony with the purposes of Juvenile Court Law and which clearly contradictory.

The judge who, for instance, engages in long-term disposition planning before jurisdiction over the case is established, is certainly not advancing the court's goals. But the one who is sure to interpret the petition to the respondents, to allow justified adjournments upon request, to hear parents and children fully and to weigh evidence carefully is acting very much in the spirit of the Law. He demonstrates in practice that a democracy protects the rights of the uneducated, of the defenseless and of minorities—even though they seldom have (or need) attorneys when they appear in Children's Court. Similarly, the judge who, in a punishing mood, sends a child to a detention facility pending case investigation, is more than ignoring the criteria for use of detention urged by his Presiding Justice and by the National Probation and Parole Association; in so doing he demonstrates failure to accept the court's very premises.

Those who have observed judges at work are agreed that variation between judges is most striking at the point where each is called upon to plan long-range dispositions after the probation officer's investigation has been completed, summaries of social agency, psychological and psychiatric reports have been received and other diagnostic guides have been assembled. At this point, after jurisdiction has been established on the basis of fact, the task is clearly one of making maximum use of all aids to understanding a child. The plan eventually arrived at should give the most promise of helping or rehabilitating. In short, the judge must make a treatment disposition.

Yet, regard the practice of judges who, because they distrust psychiatrists, often refuse to entertain recommendations for psychiatric study despite evidence that it would be helpful. When such a study has been made, they choose to rely on their own "common sense" plans. In one case which came before such a judge for disposition, a probation officer, under instructions from another judge, had worked for several months to bring parent and child to a state of readiness for help by the court's Treatment Clinic. During the hearing, the judge convinced the mother that the plan was unnecessary and gave both mother and son some "advice," in lieu of treatment.

Other judges also reject the idea that they are members of a team and that, as team leader, they must draw on the skills of others. Probation officers prepare case studies but these Judges often arrive at dispositions without even reading reports. A hasty courtroom impression or one or two brief questions —and a commitment is made or other far-reaching plans established.

Contrast these judges with still others, who believe that the offense of the child or the neglectful conduct of parents are symptoms of difficulty. Having determined the truth of allegations, they see their task in terms of understanding the meaning of the difficulty. They marshal all possible help to such understanding, carefully considering the reports of the field workers (probation officers), diagnostic experts (doctors, psychologists, psychiatrists) and community agencies. They arrive at dispositions only after consultation and

discussion. They conduct hearings in accord with the Court Rules and with sensitivity for the feelings of all concerned. They show discernment about whether and when a child should be in the courtroom. They know that even the best foster care plans or referrals to social agencies will fail unless child and parent are helped to comprehend the nature and intent of such disposition and prepared to use the opportunity constructively. At the same time, they have realistic views of probation caseloads and community resources. These Judges, in short, convey warmth, interest, and sincerity to children and parents.

On the other hand, one of their colleagues has a series of set "lectures" which are elicited by such stimuli as tears, hostility, or compliance. Not long ago, when confronted by a child brought to Court on a delinquency petition, he listened to the allegations, asking for no detail concerning the child's background. Noting that a woman stood behind the child, he lectured the boy at length about how much the mother had done for him over the years—only to be repaid in this fashion. It was some time before the probation officer could tell the judge that the woman was a foster mother who hardly knew this boy —a youngster who had never had the experience of a stable home. While even an excellent judge can make errors such as this under the pressure of heavy daily calendars, it is inevitable that a judge who does not ascertain all relevant facts and who assumes that he can, on his own, appraise any situation accurately, labels the court as one which does not care to understand what has occurred in the lives of those whom it so critically affects.

Of course, no one can describe exactly how each judge should do his job. Diverse patterns are, in part, a reflection of limited knowledge about the effect of certain court practices on children. They derive to some extent, too, from the fact that Children's Court objectives have been understood, interpreted, or even accepted in varying degree in the community. Public inertia and lack of interest have often made it difficult to gauge the community's preferences with regard to issues facing the court. Yet, some (and I emphasize "some") of the approaches are so basically contradictory, so out of line with the language and spirit of the law and so completely unaware of all that is known about helping people in trouble that they cannot be defended. Community groups and professional associations must examine and evaluate the consequences of the divergent modes of practice so that choices may be made.

Time does not permit a full picture of the performance of New York City Children's Court Judges. This is, in fact, one of the objectives of the forthcoming study of the court, to be issued under the auspices of the Citizens' Committee on Children. Many of you, however, are as well acquainted as I am with instances in which justices of this court have made important contributions towards the improvement of community facilities and the elimination of damaging practice. Yet, despite such constructive community efforts by judges in the court, under the leadership of the Presiding Justice, when the activities of individual judges in the courtroom are examined, there are major differences in the levels of achievement.

The balance sheet of the New York City Children's Court is impressive as

compared with other courts in this City and with children's courts elsewhere, but we cannot fail to note the wide gap between even this record and the noble—yet reasonable—aspirations of the juvenile court movement. We must face the fact that, while some judges in the Court are highly valued, there is an important measure of community dissatisfaction with respect to the performance of others. Concerned with the need to assure the kinds of judges best suited to the difficult task of this court, and expressing the views of judges, lawyers, members of numerous professions and many other citizens, the New York State Citizens' Committee for Children and Youth urged particular attention to the method by which judges are selected. The subject is, as you know, a timely one in connection with other courts as well—for other reasons.

It would not be difficult to choose a sound selection procedure, given full agreement about attributes prerequisite to outstanding performance on the Children's Court bench unencumbered by considerations other than qualifications. The problem is, however, that these other considerations do exist and that the attributes are not fully understood, since a person must learn what amounts to a new profession when he becomes a judge in this Court. Except in the rarest instances, he cannot have had a range of experience comparable to what would be demanded of him if he were appointed, and therefore cannot be evaluated in terms of experience alone. Moreover, no one can predict the degree to which a given candidate might succumb to the major occupational hazard of a judge—the belief that he is professionally self-sufficient and not subject to error.

Whatever the difficulty in completely defining all necessary attributes, certain prerequisites surely belong on the list: legal competence, acquaintance with family and child welfare services, knowledge of social agencies and institutions; intellectual curiosity, eagerness to learn and a deep sense of humanity are undoubtedly equally important. Basic preparation in the social and behavioral sciences has priority, but personal warmth, ability to communicate sympathetically and a talent for providing team leadership must be rated even higher.

Nobody has yet designed a method to guarantee the choice of such persons. Moreover, despite the dissatisfaction of a segment of the public with the present method of selection by the Mayor, there are judges in the Domestic Relations Court who exemplify these very qualities. Nonetheless, the present inclination to select with an eye to satisfying political interests makes the appointment of ideal candidates far too much a matter of happenstance, and mistakes have been made in the past.

Many alternative methods have been proposed, but the system which would require appointment by the Mayor of one among three individuals nominated by a Children's Court Judicial Commission appears most promising. Under this modification of the so-called Missouri Plan, the commission might be composed of representatives of legal bodies (a higher court, a bar association, a law school) and of relevant fields of specialty (welfare, education, mental hygiene, medicine). The appointments resulting from such a

method would depend on the Commission's accumulation of experience and the degree of public morality prevalent, but the proposal provides machinery for careful and objective consideration of the qualifications of potential judges.

The children's court judge has a particularly complex job. At one point, he must conduct a legal procedure most carefully, guarding individual rights, yet remaining sensitive to the meaning of the court experience to children and parents. Later, he must coordinate diagnostic efforts and determine long-range dispositions. His decisions affect the lives of children and parents crucially, yet he typically presides in the absence of attorneys, is seldom subject to review, and is never officially observed in action by the press. He is required to know many agencies and institutions and is at times obliged to choose, from among these, the least inadequate for lack of the most appropriate. His is truly great power, but equally great responsibility. Our finest children's court judges have demonstrated how much can be done with that power and how effectively that responsibility can be discharged. No less than this is the due of all children before the court.

Recent Decisions of the United States Supreme Court

By Joseph Barbash and Robert B. von Mehren

OLBERDING AND DARNELL v. ILLINOIS CENTRAL RD.

(November 9, 1953)

A truck owned by Olberding, while on temporary business in Kentucky, collided with an overpass of the Railroad, causing a subsequent derailment. The Railroad, an Illinois corporation, brought suit against Olberding, a citizen of Indiana, in the United States District Court for the Western District of Kentucky. Pursuant to the Kentucky Non-Resident Motorist Statute, process was served on the Secretary of State of Kentucky, who in turn notified Olberding. The latter then entered a special appearance and moved to dismiss on the ground of improper venue. His motion was denied and a trial resulted in a verdict for the Railroad. The Court of Appeals for the Sixth Circuit affirmed (201 F. 2d 582). Because of a direct conflict between its holding and prior decisions of the First and Third Circuits, the Supreme Court granted certiorari (345 U. S. 950). It reversed the decision below.

Justice Frankfurter, writing for the majority, found that the problem presented was "a horse quickly curried". Indeed the answer was plain to see for all who read 28 U. S. C. §1391 (a) which provides that in diversity cases venue must be laid in "the judicial district where all plaintiffs or all defendants reside." The Railroad, of course, had waived venue by bringing the action in Kentucky. Olberding, however, who was not a resident of Kentucky, had not waived venue merely by operating his truck in Kentucky. The Kentucky statute did not provide for formal appointment of the Secretary of State as Olberding's agent and Olberding had not made such an appointment; it merely provided that, by Olberding's operating his truck in Kentucky, the Secretary became Olberding's agent for the service of process. Since the Kentucky statute met the requirements of due process (*Hess* v. *Pawloski*, 274 U. S. 352), Olberding could be sued in a court of that state. However, to conclude that he had waived his federal venue rights "is surely to move in the world of Alice in Wonderland." *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, does not require a different result; there Bethlehem had actually designated an agent in New York for the service of process and thus waived its venue rights. And, in a state where formal designation of the Secretary of State as agent to receive service of process on behalf of the nonresident motorist is required and has been made (*Kane* v. *New Jersey*, 242 U. S. 160), the *Neirbo* rule would apply and venue would be waived.

Justice Douglas, apparently concurring with the majority's result but not convinced by its reasoning, simply concurred in the result.

Two members of the Court—Justices Reed and Minton—were content to

move in Alice's world. They dissented in an opinion which at least has the virtue of logically applying the laws of that world. They could see no reason why, on the one hand, when Alice is in Wonderland (a *Kane* v. *New Jersey* state) she should be held to have waived venue, and on the other, when she is behind the Looking Glass (a *Hess* v. *Pawloski* state such as Kentucky) she should be said not to have waived venue. Although both lands may have elements of unreality, the rule that venue is waived in both situations "would achieve a . . . desirable result, trial at the logical place, the location of the incident that gives rise to the cause of action."

TOOLSON V. NEW YORK YANKEES, INC.
KOWALSKI V. CHANDLER
CORBETT AND EL PASO BASEBALL CLUB, INC. V. CHANDLER

(November 9, 1953)

When the Supreme Court handed down its per curiam opinion in the instant cases, the New York Times carried a headline: "Baseball A Sport, and Not Business, High Court Rules." The lead was to the same effect. Newspapers are often imprecise in describing judicial action, but here the Times sinned more than usual. If its headline described any baseball ruling by the Supreme Court, it was one in 1922, not 1953.

In all three of the 1953 cases, treble damage actions under the Sherman and Clayton Acts, the plaintiffs charged they had been injured by restraints practiced by units of organized baseball. The several defendants moved for dismissal on the alternative grounds that baseball was not interstate trade or commerce and that, if it were, any restraints practiced were not of interstate trade or commerce. All three cases were dismissed on the authority of *Federal Baseball Club* v. *National League,* 259 U. S. 200 (1922), a treble damage Sherman Act case in which the Supreme Court held that baseball: (1) was not trade or commerce and (2) was not interstate, any interstate aspects being merely "incidental." In each case the Court of Appeals affirmed on the same authority.

The Supreme Court granted certiorari, probably because of conflict with *Gardella* v. *Chandler,* 172 F. 2d 402 (2d Cir. 1949), and affirmed, Justices Burton and Reed dissenting. The opinion, per curiam, is only one paragraph, but characterizes baseball as a "business" no less than four times:

> "In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject

> to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

The New York Times headline may well have been occasioned by the dissenters' interpretation of the majority opinion as "ineffect" announcing "that organized baseball, in 1953, still is not engaged in interstate trade or commerce." Addressing themselves to this issue, the dissenters concluded that whatever the situation may have been in 1922, organized baseball is today engaged in interstate trade or commerce, and is therefore subject to the Sherman Act.

The majority's opinion, however, seems to scrupulously avoid deciding whether baseball is interstate trade or commerce. With or without re-examination of the facts, there is little question that the majority would not have decided for the defendants today on either ground given by the Court in the *Federal Baseball* case: (1) that baseball is local and any interstate aspects are incidental (see *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533 and *Lorain Journal Co.* v. *United States,* 342 U. S. 143); or that baseball is not trade or commerce (see *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485). What they did decide was that since baseball had been allowed by Congress "to develop, on the understanding that it was not subject to existing antitrust legislation," the Court should not "with retrospective effect" apply the antitrust laws. If there is to be a change, Congress should make it, and, notwithstanding any contrary implication in the *Federal Baseball* opinion, can make it.

It is interesting that in *United States v. South-Eastern Underwriters Assn.,* 322 U. S. 533, two members of the present majority were not troubled by any retrospective application of the antitrust laws to defendants which had relied on prior court decisions and Congressional inaction. Perhaps Justices Black and Douglas believe that reliance is less justified where the earlier case did not arise under the precise statute involved in the later one. In the instant cases the majority felt that its acting to correct any abuses might create havoc. In the *South-Eastern Underwriters* case, however, the Court risked havoc. The result there was not havoc, but immediate Congressional action, which took into account both the peculiar problems of the industry and at the same time made sure that it did not escape all regulation. The effect of the present decision may well be no action at all.

The instant decision is likely to be important to the broad jurisprudential problem of what courts should do with outmoded decisions which Congress has failed to overrule and on which persons have relied; it is not likely to

mean much with respect to new situations under the antitrust laws. For the latter purpose one may be wise to assume that it, as distinguished from baseball, is only a sport.

NLRB V. LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

(December 7, 1953)

During an impasse in collective bargaining between their employer, television station WBT of Charlotte, North Carolina, and their union, Local Union No. 1229, I. B. E. W., WBT radio technicians did not go out on strike. All of the technicians took turns picketing, however, and nine distributed handbills accusing WBT of presenting stale programs inferior to those "enjoyed by other leading American cities." The handbills, signed "WBT Technicians," neither mentioned the existence of a labor dispute nor asked the public to do anything. While the technicians had only been picketing, WBT took no action against them. After the nine technicians had distributed these handbills for ten days and had shown no signs of stopping, WBT fired all nine.

On the Union's charge, the NLRB General Counsel filed a complaint against WBT, alleging violation of Section 8 (a) (1) of the Taft-Hartley Act and asking reinstatement of the men with back pay. Read with Section 7, Section 8 (a) (1) makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise" of their right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board held, one member dissenting, that WBT had not violated Section 8 (a) (1). The use of the handbills, under all the circumstances, was "hardly less indefensible than acts of physical sabotage." 94 NLRB 1507, 1511. Therefore distribution of the handbills, through concerted activity, was not such concerted activity as is protected by Section 7, and the nine technicians could lawfully be discharged for having engaged in it.

On appeal the Court of Appeals for the District of Columbia reversed, holding that the Board had applied a wrong test. It was not enough for the Board to find that the activity was "indefensible"; it must have been "unlawful" if discharge is to be justified. The case was remanded to the Board to determine whether the activity was "unlawful," i.e., activity contravening "either (a) specific provisions or basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute. . . ." The Supreme Court granted certiorari and, in a 6–3 opinion by Mr. Justice Burton, reversed the Court of Appeals and instructed that the order of the Board stand.

Although the majority's opinion is somewhat confusing, it seems to have reached its result on two alternative grounds: (1) that the activity of the technicians was separable from the labor controversy—hence Section 7 was irrelevant—and the discharge was for "cause" within the meaning of Section

10 (c); and (2) that even if the activity was not separable, it was not protected by Section 7.

The major portion of the opinion discusses the first alternative, an approach not suggested by the Board or the Court of Appeals. Section 10 (c) states that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ." From decided cases the Court found "plain enough" a "legal principle" that "insubordination, disobedience or disloyalty is adequate cause for discharge." If there had been no pending labor controversy, the activity of the nine technicians was so "disloyal" as to provide that adequate cause.

The problem of the case was, therefore, whether "in fact" (1) the distribution of handbills was separable from the labor controversy and (2) if so, the men had been discharged for this separable activity or for "some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." The findings of the Board—that the technicians did not disclose the existence of a labor controversy on their handbill and that the subject matter of the handbill had no relation to the controversy—"separate the attack from the labor controversy and treat it solely as one made by the company's technical experts upon the quality of the company's product." The record showed that WBT had discharged the technicians "solely" because of the distribution of the handbills. It followed that the handbill distribution was as "adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending."

The alternative ground of the Court's decision was contained in one paragraph, which reads:

> "We find no occasion to remand this cause to the Board for further specificity of findings. Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in §7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act."

Joined by Justices Black and Douglas, Justice Frankfurter dissented. The issue, he said, was not whether the Supreme Court should sustain the Board's order, but whether the Court of Appeals properly held that the Board had applied the wrong standard. Instead of deciding this issue, Mr. Justice Frankfurter chided, the Court used Section 10 (c) and found "sufficient cause" for discharge in "disloyalty," regardless of whether the distribution of the handbills was a "concerted activity within §7." He pointed out that many "legally recognized" labor tactics would be considered "disloyal" in friendly personal relations. Moreover, "To suggest that all actions which in the absence of a labor controversy might be 'cause' . . . for discharge should be unprotected, even when such actions were undertaken as 'concerted ac-

tivities, for the purpose of collective bargaining,' is to misconstrue legislation designed to put labor on a fair footing with management."

Justice Frankfurter disagreed that the handbills could be separated from the labor controversy. More important, he did not believe that the Board had made such a finding, and he would, in any event, remand the case to the Board for a finding which would "leave no doubt whether the technicians, in distributing the handbills, were, so far as the public could tell, on a frolic of their own or whether this tactic, however unorthodox, was no more unlawful than other union behavior previously found to be entitled to protection."

Perhaps the real explanation of this case is the revulsion which the majority, like the Board, felt for the conduct of the nine technicians. Yet the majority was for some reason unwilling to adopt wholeheartedly the Board's candid articulation of this revulsion. If that reason was the lack of precision in the Board's standard, the majority does not seem to have been too successful in providing a less elusive substitute. It is therefore fortunate that the Court, notwithstanding an interpretation by Justice Frankfurter to the contrary, at no point ruled out the Board's test. However imprecise, the Board's criterion of relative indefensibility not only adequately fitted this case and the previously decided cases, but might well continue to prove a flexible and useful articulation of the difference between sheep and goats in a pasture where greater precision may be impossible.

WILKO V. SWAN, ET AL.

(December 7, 1953)

Section 12 (2) of the Securities Act of 1933 vests in the buyer of securities a special right to recover for damages caused by a seller's misrepresentations. Section 14 provides that any "condition, stipulation, or provision" waiving "compliance with any provision" of the Act "shall be void." Section 3 of the United States Arbitration Act provides for the staying of legal proceedings where there is an agreement in writing providing for arbitration. The instant case concerns the interrelation of these sections when a buyer of securities has made an arbitration agreement with a seller of securities.

In 1951 Wilko purchased securities from the partnership of which the defendants were members. Two weeks later he sold them at a loss. Thereafter he brought an action pursuant to Section 12 (2), claiming that his loss was due to the partnership's misrepresentations. Instead of answering, the defendants sought a stay until the controversy had been arbitrated in accordance with the provisions of a margin agreement between the partnership and Wilko. They relied upon Section 3 of the Arbitration Act. The District Court refused to grant a stay (107 F. Supp. 75) and was reversed by the Court of Appeals for the Second Circuit (201 F. 2d 439). The Supreme Court reversed the Court of Appeals. Throughout the case the SEC participated as *amicus curiae* in support of Wilko's position.

Justice Reed wrote for the majority; Justice Jackson concurred in an

opinion of one paragraph; Justices Frankfurter and Minton dissented. The majority's line of argument was this: The Securities Act affords a buyer of securities special venue rights and Section 12 (2) alters the common law by making lack of knowledge of the misrepresentation a defense as to which the seller has the burden of proof rather than a part of the buyer's affirmative case. The buyer by agreeing to arbitrate loses his special venue rights and may lose the special rights afforded him by Section 12 (2). Although in any permissible arbitration these rights would apply, they might not be applied properly by "arbitrators without judicial instruction on the law." Moreover, the arbitration award might be made in such a form—without an explanation of reasons and without a complete record of the proceedings—that departure from the applicable standards could not be ascertained on judicial review. And, even if ascertained, departure could not be corrected, for in the federal courts arbitrators are subject to judicial review only for manifest disregard of the controlling law and not for mere errors in interpretation. Admittedly the case involved not only the policy of the Securities Act but also the policy of the Arbitration Act—that litigants should have an opportunity to secure prompt and economical solution to controversies through arbitration. However, the Securities Act, which protects the rights of investors and specifically forbids the waiver of these rights, embodies a specific policy that overrides the general policy of the Arbitration Act.

The dissenters argued that arbitration afforded a buyer full protection of all the rights given him by Section 12 (2) and that judicial review could rectify any departure from these legal standards. They indicate that they would hold a waiver ineffective only if there were a showing in the record that the buyer could not have purchased securities without making the arbitration agreement. There was no such showing here.

Concurring, Justice Jackson made two points: (1) He said he was unwilling to hold, as the majority had as a basis for its decision, that legal errors of arbitrators cannot be corrected by judicial review and (2) while he agreed that arbitration agreements made prior to a controversy could not be waived, he believed that those made at the time of the controversy could be waived. Apparently Justice Jackson made the latter point because of a possible ambiguity in the majority opinion. Although the majority limited its holding to cases where the agreement to arbitrate is made "prior to the existence of the controversy," its reasoning is of general application and at times it speaks in absolute terms. Indeed, it may be compelled by the reasoning which it used here to decide that arbitration agreements are void even if made after the controversy under the Securities Act has arisen. It should be noted, however, that the majority, relying on the Federal Employers' Liability Act release case of *Callen* v. *Pennsylvania Rd.*, 332 U. S. 625, 631, stated that "the Securities Act does not require" suit. If the parties can properly settle a Securities Act controversy, it might follow that they could, after the controversy had arisen, do the lesser thing of agreeing to arbitrate.

Committee Report

COMMITTEE ON FOREIGN LAW

REPORT ON THE TRADING WITH THE ENEMY ACT OF 1917

The Committee on Foreign Law recommends that the Trading With the Enemy Act of 1917, as amended, be amended as follows:

AMENDMENT NO. 1

That Section 33 of the Trading With the Enemy Act of 1917, as amended, be further amended by striking out, wherever it appears, "April 30, 1949" and inserting in place thereof "April 30, 1955."

Many hardship cases arise by reason of the fact that the time to file claims for return of property under present statutory provisions has expired.

50 U. S. Code, Appendix, Section 33, provides that no return may be made pursuant to Section 9 or 32 unless notice of claim has been filed: in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later.

Section 33 further provides that no action pursuant to Section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later.

Many persons who are prisoners in the Soviet-occupied zone and have been such ever since Russia has occupied that zone, were not informed of the vesting of their property, and, therefore, have allowed the time to expire in which to file claims for the return of their property. Therefore, the date of April 30, 1949 should be changed to April 30, 1955, and the time of two years from the vesting of the property to five years, whichever is later.

AMENDMENT NO. 2

That Section 32 of the Trading With the Enemy Act of 1917, as amended, be amended by adding after subsection (g) thereof the following new subsection:

Editor's Note: The report published here was approved by the Committee on Foreign Law at its meeting on November 18, 1952.

"(h) Any person eligible under this section to file notice of claim for return aggrieved by an order of the Alien Property Custodian denying his claim in whole or in part may obtain review by filing in the District Court of the United States for the District of Columbia within sixty days after receiving notice of such order a written complaint naming the Custodian as defendant and praying that the order be modified or set aside in whole or in part. A copy of such complaint shall be served upon the Custodian who within sixty days after service on him shall certify and file in said court a transcript of the record of the proceeding in the Office of Alien Property with respect to such claim. Upon good cause shown such time may be extended by the court. Such record shall include the claim in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and any findings or other determinations made by the Custodian with respect thereto. The court may, in its discretion, take additional evidence upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or setting aside the order in whole or in part, and directing a return of the vested property if it finds the facts so require. The judgment of the district court shall be appealable in usual course. Nothing herein contained shall be construed to deny to persons eligible to invoke the judicial remedies afforded by section 9 of this Act the right to do so."

Subdivision (5) of Section 32(a) provides

"that such return is in the interest of the United States."

It has been held that this provision vests absolute discretion in the Office of Alien Property (*McGrath* v. *Zander*, October 10, 1949, Court of Appeals of District of Columbia, 177 Fed. (2d) 649) and that this discretion is not subject to judicial review.

A discretion vested in an executive, without a provision for review, is contrary to the spirit of the Administrative Procedure Act enacted upon the theory that Administrative Agencies' decisions should always be subject to judicial review.

The suggested amendment remedies this defect in the law.

AMENDMENT NO. 3

That the Joint Resolution introduced by Senator Chavez June 27, 1953, known as S. J. Res. 92, 83d Congress, 1st Session, to return property vested under the Trading With the Enemy Act as the property of Germany or German nationals, or in which they had any interest, together with amendment thereto proposed by Senator Chavez August 3, 1953, be adopted. The said proposed Joint Resolution, as amended, reads as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding any existing law to the contrary, all property (or its net proceeds) of every character or description which was vested after December 7, 1941, by the Alien Property Custodian, or his successor, the Attorney General of the United States, under the Trading With the Enemy Act, as the property of Germany or of German nationals, or because it was believed that (a) Germany or nationals of Germany had any interest therein or owned or controlled the same or any portion thereof, or (b) that the owner thereof was acting directly or indirectly, partly or wholly, for or on behalf of Germany or of nationals of Germany, shall be returned to the person, firm, trust, association, or corporation who or which was the owner thereof at the time of such vesting, or to the legal representative or successor, as the case may be, of such owner, if the owner be dead or if its existence shall have been in anywise terminated. Increment received upon such vested property shall also be delivered and paid over to such owner and provided that a claimant to property so vested who has earlier received a payment from or on behalf of the Office of Alien Property in the nature of compromising his claim to such property so vested whether or not at said time said claim was being litigated, shall be required to tender such payment to the Government as a condition to receiving back such vested property, and in a case where a claimant to property either blocked or vested has been required to make a payment to the Office of Alien Property by way of a compromise he shall be entitled to a return of such payment: *Provided, however,* That no return shall be made to the East German Government or to those who reside or have their domicile exclusively in the Russian Zone of Occupation in Germany: *And provided further,* That an amount equal to 20 per centum of the aggregate value of such money or other property shall be retained by the Government of the United States as reimbursement for the administration costs and expenses of the Office of Alien Property; and no money or other property shall be returned unless the person entitled thereto under the terms of this resolution files a written consent to such 20 per centum retention.

"Sec. 2. Funds appropriated by the Congress and allocated by the Mutual Security Agency for the Western German Government, shall be decreased by the value of the above-described property: *Provided, however,* That such decrease shall not exceed in the aggregate the sum of $250,000,000; and moneys equaling the amount of such decrease shall be transferred to the War Claims Fund to be administered under the provisions of the War Claims Act of 1948."

AMENDMENT NO. 4

The Committee further recommends that Section 20 of the Trading With the Enemy Act of 1917, as amended, be amended to read as follows:

"Sec. 20. No property or interest or proceeds shall be returned under this Act, nor shall any payment be made or judgment awarded in respect of any property or interest vested in or transferred to the Alien Property Custodian unless a schedule of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services in connection with such return or payment or judgment, has been furnished to, and approved in accordance with this section by, the President or such officer or agency as he may designate, or the court, as the case may be. The Alien Property Custodian is authorized (upon request as hereinafter provided) to fix reasonable fees (whether or not fixed under any contract or agreement) for services in connection with the return of or the making of any payment in respect of any such property or interest or proceeds (other than pursuant to an order of the court). The Alien Property Custodian is authorized and requested to mail to each owner or creditor notice of the provisions of this section. No fee shall be fixed under this section unless written request therefor is filed with such Alien Property Custodian before the expiration of sixty days after the mailing of such notice. In the case of nationals of Germany and Japan such notice may be mailed to and the written request may be filed by the duly accredited diplomatic representative of such nation.

"Any person aggrieved by the determination of the Alien Property Custodian may within thirty days after the making of such determination petition the District Court of the United States for the District in which he resides to review the determination and pray that the said determination be modified. A copy of said petition shall be served upon the Custodian who within fifteen days after service on him shall certify and file in said court a transcript of the record of the proceeding in the Office of Alien Property with respect to such determination. Upon good cause shown such time may be extended by the court. Such record shall include the claim in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and any findings or other determinations made by the Custodian with respect thereto. The court may, in its discretion take additional evidence upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or setting aside the determination in whole or in part. The judgment of the District Court shall be appealable in usual course. Any person accepting any fee in excess of an amount approved hereunder, or retaining for more than thirty days any portion of a fee, accepted prior to approval here-

under, in excess of the fee as finally approved, shall be guilty of a violation of this Act."

Under the present statute, as amended, the 10% permitted thereunder is in many cases so small that many claimants are deprived of representation by lawyers and the protection afforded thereby, whereas under the proposed amendment the procedure in relation to a Mixed Claims Commission award, as provided in Section 9 of the Settlement of War Claims Act of 1928 (45 Stat. 254), is adopted.

Respectfully submitted,

COMMITTEE ON FOREIGN LAW

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RECENT LITERATURE ON ANTITRUST LAW 1949–53

Antitrust is not and never has been a partisan issue. It was enacted during a Republican administration. Its major revisions were adopted during Democratic administrations. Its most vigorous enforcement has occurred in both Democratic and Republican administrations alike. Both major parties have included antitrust planks in their platforms in virtually every Presidential election since the enactment of the statute. It should therefore be possible to find common ground for a program of reform which will command bi-partisan support.

MILTON HANDLER

From various groups and agencies have come forth suggestions, studies and reports to assist the Attorney General's Commission on the study of antitrust laws. These contributions will help to clarify the issues and debate in formulating a national policy that will "strengthen our laws to preserve free enterprise against monopoly and unfair competition." In this checklist the more recent literature on the subject is gathered for handy reference.

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